

Conversely, claimant contends the Board does not have jurisdiction in this appeal as the preliminary hearing did not address a compensability issue listed in K.S.A. 44-534a. Claimant also argues respondent did not contest the compensability of claimant's injuries at the preliminary hearing but, instead, has raised that issue for the first time on this

appeal. In the alternative, claimant argues the Board should affirm the January 28, 2005 Order. Accordingly, claimant asks the Board either to dismiss this appeal or to affirm the January 28, 2005 Order.

The issues before the Board on this appeal are:

1. Did respondent, at the January 27, 2005 preliminary hearing, challenge the compensability of claimant's alleged injuries?
2. If so, is claimant's present need for medical treatment related to injuries that claimant sustained in an accident that arose out of and in the course of employment with respondent?
3. Does the Board have jurisdiction to review the Judge's implied finding that respondent had failed to provide medical treatment for claimant?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the Board finds:

1. While at work on August 6, 2004, claimant caught his left leg on a cart handle and fell, hurting his left knee and left shoulder. The next day, claimant reported the accident to his employer, Wichita Executive Aircraft, and requested medical care.
2. About two weeks later, claimant saw Dr. Travis Hubin. Claimant initially complained to Dr. Hubin of left knee symptoms only as those were worse than the symptoms in his left shoulder. Indeed, Dr. Hubin ordered a left knee MRI and the resulting September 9, 2004 MRI report reflected that claimant was unable to straighten his left leg. Moreover, at the time of their first meeting, claimant was not having problems with either his right knee or his low back.
3. After the MRI, claimant began receiving treatment from Dr. Daniel J. Prohaska, who performed surgery on claimant's left knee. On October 1, 2004, Dr. Prohaska performed a left knee arthroscopic partial medial and lateral meniscectomy. The surgery confirmed claimant had a meniscal tear, a loose body in the intercondylar notch, degenerative joint disease, and a root tear of the posterior horn of the lateral meniscus, all in the left knee.
4. According to claimant, he also told Dr. Prohaska about his left shoulder and low back pain. But those complaints do not appear in the doctor's office notes that were introduced at the preliminary hearing. And Dr. Prohaska did not treat claimant's left

shoulder or low back. Instead, the doctor only treated claimant's left knee, eventually releasing claimant on January 25, 2005. Dr. Prohaska recommends a total left knee replacement. Claimant testified, in part:

Q. (Mr. Belden) Okay. Now, did Doctor Prohaska tell you what he believed to be the cause -- the reason for the knee replacement?

A. (Claimant) Just wear and tear, and part of that -- the injury.¹

5. Following the October 1, 2004 left knee surgery, claimant began noticing problems with his lower back and right knee, which he had injured years before. Claimant attributes his present right knee and low back symptoms to favoring the left knee and limping. According to claimant, he first injured his right knee 10 or 12 years ago playing softball and he received some type of surgery that cleaned it out. In addition, claimant testified he received five injections in his right knee approximately five years ago and that he had been previously diagnosed as having arthritis in that knee for which he was taking medication at the time of his August 2004 accident. Furthermore, claimant had previously seen a chiropractor several years ago for his low back. But the first time claimant had ever experienced left knee or left shoulder problems was following the August 2004 accident at work.
6. At claimant's attorney's request, Dr. Bradley W. Bruner evaluated claimant. Dr. Bruner examined claimant on January 6, 2005, and determined claimant should have both knees replaced. The doctor concluded claimant's right knee symptoms are a natural consequence of the left knee injury and claimant attempting to protect the left knee. Moreover, Dr. Bruner also concluded claimant's low back symptoms were due to claimant's left knee injury and the resulting altered gait. Finally, the doctor determined claimant had separated his left shoulder.

CONCLUSIONS OF LAW

The January 28, 2005 Order should be affirmed.

The Board has jurisdiction at this juncture of the claim to address whether claimant's alleged injuries resulted from an accident that arose out of and in the course of his employment. Before taking testimony at the January 27, 2005 preliminary hearing, the Judge noted one of the issues being raised was "causation."² Moreover, the parties' closing arguments touched upon that issue.

¹ P.H. Trans. at 35.

² *Id.* at 4.

Claimant fell at work on August 6, 2004, and injured his left knee and left shoulder. That accident arose out of and in the course of claimant's employment with respondent. Claimant then developed low back symptoms and right knee symptoms as a natural consequence of the left knee injury and the resulting altered gait. Accordingly, claimant is entitled to receive medical benefits for his left knee, right knee, left shoulder, and low back.

Respondent argues the medical treatment claimant seeks for his left knee is due to a preexisting condition (arthritis) and, therefore, respondent should not be responsible for those medical benefits. But an injury is compensable under the Workers Compensation Act even when an accident at work only serves to aggravate a preexisting condition.³ The test is not whether the accident caused a condition but, instead, whether the accident aggravated or accelerated a preexisting condition.⁴ In this instance, claimant's left knee was not symptomatic before the August 6, 2004 fall. But despite left knee surgery and medications, claimant's left knee continues to ache and shift, and the knee has lost motion. The Board concludes the preexisting degenerative joint disease in claimant's left knee has been aggravated by the accident at work and, therefore, claimant is entitled to receive medical benefits for that condition.

Respondent contends the Judge exceeded his jurisdiction by appointing Dr. Bruner as claimant's treating physician. But at this juncture of the claim, that issue is not subject to review.

This is an appeal from a preliminary hearing order. Consequently, not every alleged error is subject to review. The Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.⁵ Moreover, the Board has specific authority to review the preliminary hearing findings and issues listed in K.S.A. 44-534a, which are:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and

³ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

⁴ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁵ K.S.A. 2004 Supp. 44-551(b)(2)(A).

(4) do certain other defenses apply.

The term “certain defenses” refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.⁶

The issues of whether a worker needs ongoing medical treatment or whether the employer is failing to provide medical treatment are not preliminary hearing findings or jurisdictional issues listed in K.S.A. 44-534a that may be reviewed from a preliminary hearing order. Those issues do, however, comprise questions of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

Respondent’s argument that the Judge exceeded his jurisdiction by appointing a specific doctor to treat claimant is without merit. A judge, at a preliminary hearing, has the authority to determine whether an employer has failed or neglected to provide an injured worker with medical treatment. And the judge may appoint a doctor to provide such treatment if it is not being provided. Without that authority, an employer could delay or refuse to provide appropriate medical treatment and, thus, effectively prevent an injured worker from receiving crucial medical treatment in a timely manner.

In conclusion, claimant’s testimony is credible. Claimant has established, for preliminary hearing purposes, that he is entitled to receive workers compensation benefits for his August 6, 2004 accident and the resulting injuries to both knees, left shoulder, and low back. Moreover, the Judge did not exceed his authority in appointing Dr. Bruner to treat claimant.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but, instead, subject to modification in a full hearing of the claim and full presentation of the facts.⁸

WHEREFORE, the Board affirms the January 28, 2005 Order.

⁶ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁷ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁸ K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

- c: Steven R. Wilson, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director